No. 06-282

IN THE

Supreme Court of the United States

CATHOLIC HEALTHCARE WEST;
CATHOLIC HEALTHCARE WEST ARIZONA,
and MICHAEL BERENS,

Petitioners,

v.

UNITED STATES OF AMERICA *ex rel.* PATRICIA
HAIGHT and IN DEFENSE OF ANIMALS,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether release of documents to a *qui tam* relator pursuant to the Freedom of Information Act ("FOIA") was a "public disclosure" within the meaning of the False Claims Act statutory bar of parasitic *qui tam* actions, 31 U.S.C. §3730(e)(4)(A), when neither the relator nor the agency disclosed the documents to the general public.

2. Whether release of documents to relator pursuant to FOIA constituted a disclosure in one of the specified fora of §3730(e)(4)(A) – in this case in a federal administrative investigation or report.

PARTIES

Qui tam respondents are Patricia Haight and In Defense of Animals, who bring the underlying action in the name of, and on behalf of, the United States of American. Petitioners are Catholic Healthcare West, Catholic Healthcare West Arizona, and Michael Berens.

RULE 29.6 STATEMENT

In Defense of Animals is a not-for-profit entity. It has no parent corporation or publicly held company owning ten percent or more of its stock.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES ii

RULE 29.6 STATEMENT ii

INTRODUCTION 1

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 10

A. REVIEW IS NOT NEEDED TO ADDRESS THE SHALLOW DISAGREEMENT IDENTIFIED IN THE PETITION 11

B. ON THE FACTS OF THIS CASE, REVIEW OF THE DECISION BELOW DOES NOT PRESENT A QUESTION OF IMPORTANCE TO THE STATUTORY BAR 13

C. MULTIPLE LEGAL AND FACTUAL ISSUES COMPLICATE THIS CASE MAKING IT LESS INVITING AS A VEHICLE FOR REVIEW 14

D. THE DECISION BELOW WAS CORRECT 16

E. THE COURT SHOULD NOT HOLD THIS CASE UNTIL RESOLUTION OF *ROCKWELL* 17

CONCLUSION 18

TABLE OF AUTHORITIES

Cases

Chevron U.S.A. Inc. v. Natural Resources Defense Council,
467 U.S. 837 (1984) 14

Consumer Product Safety Comm'n v. GTE Sylvania,
447 U.S. 102 (1980) 11

Pettis ex rel. United States v. Morrison-Knudsen Co.,
577 F.2d 668 (9th Cir. 1978) 2

United States ex rel. Fallon v. Accudyne Corp.,
97 F.3d 937 (7th Cir. 1996) 2

United States ex rel. Feingold v. Administar Federal, Inc.,
324 F.3d 491 (7th Cir. 2003) 2

United States ex rel. Marcus v. Hess,
317 U.S. 537 (1943) 2, 4, 5, 13

United States ex rel. Mistick PBT v. Housing Authority,
186 F.3d 376 (3rd Cir. 1999) 1, 10-13

United States ex rel. Reagan v. East Texas Medical Center,
384 F.3d 168 (5th Cir. 2004) 12

United States ex rel. Schumer v. Hughes Aircraft Co.,
63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds*,
520 U.S. 939 (1997). 4

United States ex rel. State of Wisconsin v. Dean,
729 F.2d 1100 (7th Cir. 1984) 2, 4

United States v. Solinger, 2006 U.S. Dist. LEXIS 75063 (W.D. Ky. 2006) 13

Wang v. FMC Corp., 975 F.2d 1412 (9th Cir. 1992) 3

Statutes

31 U.S.C. §1331 2

31 U.S.C. §1345 2

31 U.S.C. §232(C) (former law) 2

31 U.S.C. §2732(a) 2

31 U.S.C. §3729 5

31 U.S.C. §3730(b) 5

31 U.S.C. §3730(e)(4) 1, 2, 13, 14, 16

False Claims Act, former 31 U.S.C. §232(C) 2

Other

S. Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91 3

INTRODUCTION

This case involves the statutory bar of the False Claims Act ("FCA"), which was designed to prohibit parasitic *qui tam* actions. As defined in the 1986 FCA amendments, 31 U.S.C. §3730(e)(4), a parasitic *qui tam* action is one which is based upon the public disclosure of the allegations of false claims in one of the statutorily-specified fora, unless the United States government intervenes or the relator is "an original source" of the information upon which the allegations are based.

Below, the court held the parasitic *qui tam* bar did not apply to this case. It found that release of a fraudulent National Institutes of Health grant application to relator did not constitute a federal administrative "investigation" or "report" – two of the possible specified fora of §3730(e)(4) – and that therefore, on the facts of this case, the release did not trigger the statutory bar. Petitioners claim the Ninth Circuit's judgment conflicts with the majority opinion in *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3rd Cir. 1999), which was written by Justice (then-Judge) Alito.

While there is a potential disagreement over one issue decided below and in the majority opinion in *Mistick*, there is hardly a deep conflict in the circuits. Both the Ninth Circuit and the Third Circuit held that a FOIA production was a "public disclosure" and could constitute one of the specified fora. The only real difference between the two opinions concerns whether a FOIA production must always constitute disclosure in a specified forum. Given the facts of this particular case – where the relator was simply told by the agency that she could go down to the defendants' hospital and receive a copy of the grant application – the finding that there was no administrative investigation or report is hardly controversial, and is completely unworthy of review.

STATEMENT OF THE CASE

1. As originally enacted in 1863, the *qui tam* provisions of the FCA had no limitation on who could serve as relator. In response to the 1943 the Supreme Court case of *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), Congress amended the statute to introduce the first statutory bar of parasitic actions.[1] In its first version, the bar prohibited actions when the government already knew of the information upon which the lawsuit was based. *See* former 31 U.S.C. §232(C) (1943) (precluding actions that were "based on evidence or information in possession of the United States, or any agency, officer or employee thereof, at the time such suit was brought").

The problem with the 1943 "government knowledge" bar was that it went too far, foreclosing operation of the important *qui tam* enforcement provisions. Even when the government had such information, officials might determine for lack of resources or political will not to seek remedies. Moreover, in applying the 1943 law, courts relied upon the "government knowledge" bar even when it was clear the action not a "parasitic" – for example when the government conducted its investigation of fraud as a result of the disclosures of the relator *See, e.g., United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984) (Wisconsin not

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[1]Although petitioners claim the statutory bar effects "subject matter jurisdiction," courts which have looked at the issue hold it is not a true jurisdictional statute. Subject matter jurisdiction is conferred by §§1331, 1345 and 2732(a); §3730(e)(4) effects the substantive rights of the parties. *See United States ex rel. Feingold v. Administar Federal, Inc.*, 324 F.3d 491, 494-95 (7th Cir. 2003); *United States ex rel. Fallon v. Accudyne Corp.*, 97 F.3d 937, 940-41 (7th Cir. 1996).

permitted to maintain *qui tam* suit because the federal government already had learned of the information when the state reported it).

In 1986, in the midst of increasing concern over fraud, Congress amended the FCA's prohibition of parasitic suits. In the 1986 version, Congress sought to overturn the federal courts' "severely restrictive interpretations." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Importantly, the 1986 amendments fundamentally altered the underlying assumption of the 1943 law: that the *qui tam* provisions were designed to assist the government only when it did not know of the fraud. It also dispensed with the idea that, in order to be a true relator, the *qui tam* plaintiff must bring new information of the fraud to the government. The 1986 *qui tam* provisions eliminated the "government knowledge" bar, and put in its place another bar which expressly authorized relators to enforce the FCA, even in those cases where the government knows of the fraud and chooses not to pursue it, and even when the relator adds to the mix no new information on the fraud.

> [I]n passing the 1986 amendments, Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." ... S. Rep. No. 345, 99th Cong., 2d Sess. 24-26 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266, 5289-91. The 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct.

United States ex rel. Schumer v. Hughes Aircraft Co., 63 F.3d 1512, 1519 (9th Cir. 1995) (citation omitted), *vacated on other grounds*, 520 U.S. 939 (1997).

Thus, the1986 FCA amendments crafted a narrow rule designed to exclude only truly parasitic *qui tam* actions. It did this by expressly limiting the circumstances when the bar could be invoked to those actions like *Marcus v. Hess* – where the public disclosure of a government investigation proves to be the basis for the relator's allegations. And to protect any *qui tam* relator who was "an original source" of information to the government, such as in *Wisconsin v. Dean*, Congress created an exception to the bar for any relator that was on "original source."

That Congress had *Marcus v. Hess* in mind when it amended the bar in 1986 is made clear by the fact that *each* of the four elements in *Hess* was made an express requirements:

> (1) The action must be "based upon" the disclosure; as occurred in *Hess* when the relator derived his knowledge from the filing of the criminal indictment.
>
> (2) The disclosure must be "public"; as occurred in *Hess* when the criminal indictment was placed in the court's open files.
>
> (3) The content of the disclosure must be of the "allegations or transactions" of the fraud or false claims; as occurred in *Hess* when the information in the indictment expressly stated the fraud.
>
> (4) The medium of the disclosure must be one of the specified fora; as occurred in *Hess* when a pleading was filed in connection with a federal investigation and criminal hearing.

2. Respondents-relators are Dr. Patricia Haight and In Defense of Animals, an animal welfare advocacy organization where Dr. Haight serves as Southwest Regional Director. Petitioners-defendants are Dr. Michael Berens and the private research institutions that employ him. In their *qui tam* action, filed under §3730(b), relators alleged that defendants submitted a false and fraudulent grant application to NIH in order to secure federal funds in violation of §3729 of the FCA.

Beginning in 1990, defendants conducted a research project involving pregnant beagles. The project was conducted under the supervision of the Institutional Animal Care and Use Committee ("IACUC") at Arizona State University ("ASU"). It was privately funded until 1998, when NIH awarded a grant.

Defendants' stated purpose for the project was to create a canine model of a glioma (brain tumor) using beagle puppies. This was supposed to be accomplished by first surgically injecting fetal puppies in the flank of the leg with glioma tumor cells, while they gestated in the dam's uterus. When the puppies became four to six months old, the intent was to remove the subcutaneous glioma tumors that developed and implant them into the brain of the same animals.

Between the years 1990 and 1997, the project had an abysmal record. In those seven years, less than a handful of tumors were created, and of those only two were successfully transplanted to the brain. In addition, almost half of the litters aborted, and many of the pups were born with congenital defects or died shortly after birth. Dr. Berens' surgical technique used to label prenatal pups according to the protocol exacerbated these problem, forcing him to forego labeling to the complete demise of his project. Overall, it had a failure rate of more than 95%.

In October 1997, Dr. Berens made what his second grant application seeking NIH funding. NIH requires the principal investigator to provide detailed information about proposed research to expert peer reviewers, who in turn evaluate and prioritize various projects in competition for limited NIH funds. None of the information about the failure of the project was included in the NIH grant application. Instead, defendants made false and misleading statements, and they omitted material information, to deceive the reviewers and obtain federal funds.

In their *qui tam* action, relators alleged that defendants:

> (1) falsely stated they had achieved a tumor take rate of up to 80%, knowing they had been profoundly unsuccessful, with at best a 5% tumor take rate and a total of only two tumors after 7 years of research and 33 fetal implant surgeries;
>
> (2) falsely represented they had achieved the technical and surgical skills necessary to perform the surgery;
>
> (3) falsely represented the number of tumors that researchers would create under the grant, unrealistically projecting a factorial design of 80 tumors in 80 pups coming from 18 fetal implant surgeries in 18 dams;
>
> (4) made other false statements in the grant application, including false representations of about the commitments of the purported collaborator, Dr. Geoffrey Pilkington; and false justifications about the need for experimenting on prenatal pups.

3. There is no dispute that relators based their *qui tam* action on their own extensive investigation into the conduct of defendants' research project. Part of that investigation included obtaining a copy of the NIH grant application through a request under the FOIA. But the grant application contained only the false representations defendants made to NIH, not the information showing those representations to be false. Dr. Haight derived her knowledge of their falsity through her own direct and independent investigation.

Dr. Haight testified she based her "allegations of false and misleading statements in defendants' NIH grant application on information and belief formed after [her] own independent investigation into Dr. Berens' research project." Relator did the work of the investigation herself; she gathered, reviewed and synthesized primary records from NIH, Arizona State University, the Southern Arizona VA Hospital and a private accrediting agency. She also conducted her own interviews, private conversations and correspondence with veterinarians, consultants, employees and staff who worked with the subject dogs, including defendants' own representatives.

Although she began her investigation at the request of one of her students and others who were protesting the animal research, no one person or group of people told her the scientists had lied to NIH or had otherwise defrauded federal funds. Because the records themselves were innocuous, she had to "bridge the gap" and discover the false statements. Her allegations were formed independently after she herself reviewed the information gained through her own investigatory efforts.

4. Throughout her pre-filing investigation, Dr. Haight learned no information about defendants' research project through any governmental hearing, investigation, audit or report. Dr. Haight testified without contradiction that no

documents disclosed, referred or even related to a governmental report or investigation.

In fact, NIH never conducted an investigation or report on defendants' research project, either in connection with the grant or Dr. Haight's FOIA request. The totality of NIH's efforts in response to relator's FOIA request was to inform her, after some delays, that she could go to St. Joseph Hospital herself and obtain a copy of the NIH grant application. No evidence exists that NIH ever reviewed the grant application in connection with the FOIA request. Nor is there any evidence that NIH disclosed a report on Dr. Haight's request.

Below, the Ninth Circuit found these facts to be determinative:

> The specific facts of this case illustrate how ill-fitting the labels of "report" or "investigation" can be for responses to FOIA requests. Haight ultimately obtained the documents that she had requested by FOIA – saliently Dr. Berens' successful grant application containing the alleged misrepresentations – by walking to Barrow and obtaining them herself. In this instance, the FOIA response consisted only of alerting Haight to the location of the documents relating to Dr. Berens' research. Far from putting any work product into those documents, in this instance the FOIA response did not even involve duplication. Responding to Haight's FOIA request did not position the government to detect or respond to the alleged fraud.

Haight, on the other hand, put in substantial time and effort into uncovering the allegations the Relators make in their complaint. In addition to filing a FOIA request, Haight requested documents, including animal care records and minutes from IACUC meetings, from Arizona State University; she toured the two facilities where dogs associated with Berens' research were housed; she contacted and interviewed at least nine people who had knowledge about the Berens' project; she also corresponded with a scientist overseas who was listed as a consultant to Berens' research. Moreover, she combed the documents that she received through her FOIA inquiry and from ASU in an attempt to learn about Berens' research. Ultimately, she uncovered what Relators allege to be serious misrepresentations about the project that resulted in an award of over $700,000 in federal funds. Relators did not behave opportunistically. To the contrary, Haight performed precisely the sort of investigative work that the qui tam provisions of the FCA encourage in order to promote detection of fraud against the government. (App. 17-18.)

REASONS FOR DENYING THE WRIT

Difference in opinion on whether a response to a FOIA request always constitutes a federal administrative investigation or report – thus triggering the statutory bar of parasitic *qui tam* actions – is more like a shallow crevice than a direct circuit split. Both the Ninth Circuit here and the Third Circuit in *United States ex rel. Mistick PBT v. Housing Authority*, 186 F.3d 376 (3rd Cir. 1999), held a FOIA production was a "public disclosure" and could trip the statutory bar if documents produced include an agency investigation or report. Because of the unique facts in this case that NIH made no investigation or report on defendants' research project, the Ninth Circuit's judgment that the bar was not invoked presents no important question worthy of review.

Moreover, the single question presented by the petition is complicated by other legal and factual issues: whether FOIA production to the relator alone constitutes "public" disclosure; whether disclosure must be in a single forum; whether the action is "based upon" the disclosure; whether there was disclosure of "allegations or transactions" of the fraud; and whether Dr. Haight qualifies as an original source. The presence of these numerous intertwined questions – two of which were not addressed by the court below – make this case a poor vehicle for review of the question presented by petitoners.

Finally, respondents urge the Court not to hold this petition for resolution until after disposition of *Rockwell Intern'l v. United States ex rel. Stone*, Case No. 05-1272, which is currently being briefed on the merits. *Rockwell* will be resolved on (1) whether the statutory bar of parasitic *qui tam* actions applies when the government intervenes, and (2) whether relator Stone qualifies as an "original source." Neither question was addressed below and neither is raised by the petition.

A. REVIEW IS NOT NEEDED TO ADDRESS THE SHALLOW DISAGREEMENT IDENTIFIED IN THE PETITION

Petitioners overstate the disagreement between the Ninth Circuit in *Haight* and the Third Circuit in *Mistick* when they suggest a "direct and genuine" split between the circuits. In *Mistick*, the Court held a response by the Department of Housing and Urban Development ("HUD") to a FOIA request was a "public disclosure" triggering the bar of parasitic actions. 186 F.3d at 383-85. But whatever disagreement exists between these two circuit court opinions, it does not run very deep.

Both circuit opinions held a response to a FOIA request was "public." In *Mistick*, the Third Circuit rested its analysis on FOIA's express purpose of making certain categories of information "available to the public," as well as on this Court's use of the term "public" in *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108-09 (1980). *See Mistick*, 186 F.3d at 383. In *Haight*, the court essentially agreed: Addressing whether the FOIA response triggers the bar, the Ninth Circuit held that it could, if the other statutory requirements are satisfied. App. 12.

Both *Mistick* and *Haight* also held that disclosure must be in one of the statutorily specified fora – a civil, criminal or administrative hearing; a federal investigation, audit or report; or from the news media. *See Mistick*, 186 F.3d at 383 ("Thus, in order to fall within this language, a disclosure (1) must be 'public' and (2) must occur in one of the specified contexts.") And both agree that this statutory list is exhaustive.

Where the disagreement lies is a narrow question: whether response to a FOIA request must *always* trigger the statutory bar. In *Mistick*, the Third Circuit broadly stated its holding that HUD's response constituted an administrative

report and investigation because, under FOIA, the agency was obligated to make a detailed examination and search for relevant information to notify the requester of the results of its investigation and deliver the information sought. *Mistick*, 186 F.3d at 384. Read broadly – as urged by petitioner in this case – the majority opinion in *Mistick* would mean that the statutory bar of parasitic lawsuits triggers in every instance when a federal agency makes a response under FOIA.

In *Haight*, the court disagreed with the broad statement of the rul . In the opinion of the panel – which included Hon. John R. Gibson, Senior United States Circuit Judge for the Eight Circuit, sitting by designation – the response to the FOIA request did not constitute an administrative report or investigation, because NIH simply informed relator where to receive a copy of the grant. "Interpreting 'report' or 'investigation' as listed in the jurisdictional bar to include any document obtained in response to a FOIA request would stretch the meaning of those terms too broadly." App. 12.

This crevice between the two circuit opinions does not require this Court's resolution. Indeed, these are only the first two circuits to address the issue head-on.[2] Lower courts have no difficulty applying the statutory bar with guidance from both decisions. *See, e.g., United States v. Solinger*, 2006 U.S. Dist. LEXIS 75063 (W.D. Ky. 2006) (discussing both *Mistick* and *Haight* to resolve the question of whether the FOIA response in that case triggered the statutory bar).

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[2]In *United States ex rel. Reagan v. East Texas Medical Center*, 384 F.3d 168, 175-176 (5th Cir. 2004), the court agreed with *Mistick*, but there were other public disclosures unrelated to the FOIA request, including a state court action and multiple administrative investigations into the allegations of fraud.

B. ON THE FACTS OF THIS CASE, REVIEW OF THE DECISION BELOW DOES NOT PRESENT A QUESTION OF IMPORTANCE TO THE STATUTORY BAR

On the narrow question of whether a response to a FOIA request by a relator must always trigger the statutory bar, the facts here do not raise any important concerns of law. Lying beneath the statutory bar is an intent by Congress to prohibit parasitic lawsuits, *i.e.*, those involving an opportunistic relator, like Marcus in *Hess*, who derives knowledge of the allegations of fraud by riding the investigational coattails of the government. In this case, since NIH conducted no investigation and issued no report into defendants' research project – either at the time of the grant application or, later, at the time of Dr. Haight's FOIA request – nothing indicates that Dr. Haight's action was parasitic. Indeed, the only thing NIH did in response under FOIA was inform Dr. Haight to receive a copy of the grant application directly from defendants.

As such, the facts of this case do not implicate the important concerns behind §3730(e)(4). While an agency's response to a relator's FOIA request might, under appropriate circumstances, provide a relator with the government's own investigation of fraud, those facts are not present here. Simply put, this case does not provide a sound basis for testing the limits of the meaning of administrative "report" or "investigation" as two of the specified fora of the FCA bar.

In the petition, defendants claim the court adopted a "knowledge standard" that is inconsistent with decisions from other circuits. This argument too is misdirected. First, the Ninth Circuit adopted no such "knowledge standard," and none exists under the current version of the FCA statutory bar. While the 1943 version prohibited *qui tam* actions based upon

information and evidence already known to the government, Congress expressly amended that provision in 1986 to substitute the current version. Consistent with those amendments, the court in *Haight* did not restrict the statutory bar to only those cases where the government was "on notice of the fraud." Petitioner's suggestion to the contrary (Petition, at 11, citing to Appendix at 15) is erroneous. Instead, the court discussed its interpretation of legislative purpose, given its peculiar history, to explain why Congress limited application of the bar to the specified fora of §3730(e)(4)(A).

It is the court's judgment that would be reviewed here, not expressed opinions on legislative purposes. In other words, the panel's discussion of FCA purposes does not provide a reason for granting the writ. *See Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984) (Court reviews judgments, not opinions).

C. MULTIPLE LEGAL AND FACTUAL ISSUES COMPLICATE THIS CASE MAKING IT LESS INVITING AS A VEHICLE FOR REVIEW

Resolving whether NIH conducted an investigation or report as a result of Dr. Haight's FOIA request is only one question of many at play in this case. Persistence of other issues will either unnecessarily complicate the resolution of the question presented or foreclose ultimate resolution of the case.

Petitioners' statement of the single question is actually a presentation of three separate questions. Whether a response to the FOIA request is a public disclosure under the FCA really asks: (1) was the disclosure "public," (2) was it in a specified forum, and (3) was it contained within a single forum? Although the Ninth Circuit resolved in relators' favor the second issue – whether disclosure was made in one of the specified fora – it assumed that it would resolve the other two issues against

them. *See* App. 9 n.1; 12. If the writ is granted in this case, this Court will be asked to look beyond those assumptions and determine (1) whether a disclosure to the relator is a disclosure that is "public," when neither the agency nor the relator discloses to the general public; and (2) whether "transactions" of fraud must be disclosed in a single forum.[3]

Similarly, even if all three of these issues were resolved against relators, resolution of the case would remain open on the question of whether relators derived their knowledge of the falsity of representations from the grant application itself. Even if the FOIA response constituted a public disclosure, no statutory bar would be invoked unless the *qui tam* action was "based upon" that public disclosure. In the conditional cross-petition, relators request the Court review that issue as well, but only in the event that the underlying writ of certiorari is granted. Although it would need to be addressed, the presence of the

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[3]Whether disclosure must be in a single forum is raised in this case because of the presence of news articles on Dr. Beren's research. In the media coverage, Dr. Haight disclosed her criticism of defendants' handling of animal welfare by defendants' researchers. None of these articles contained any allegation of fraud on the NIH grant application or in any way suggested misrepresentations by defendants to the government. Defendants nevertheless attempted to piece together an argument for disclosure of the "transactions of fraud" by combining the disclosures through FOIA with information contained in the media. Since it is admitted that neither the NIH grant application, nor the media articles, in themselves, disclosed the essential elements of the fraudulent transactions, neither one alone and the two combined should not invoke the bar of parasitic *qui tam* lawsuits.

"based upon" question complicates this case and makes it a significantly less practicable case for review.

Moreover, two issues connected to the statutory bar in this case were not addressed at all by the Ninth Circuit. First, the Ninth Circuit did not determine whether the true state of facts was publicly disclosed via an enumerated source, and second, the Court did not address the parties' contentions about "original source" status. App. 10-11. While neither question is properly presented on the petition, both operate to foreclose resolution of the statutory bar's application in this case.

In sum, the single question presented by the petition is complicated by the presence of these other legal and factual issues. Some of the issues have not developed in the case law, but should properly be addressed by the Court in the event the writ is granted. Other issues would foreclose resolution of the case, but because they are not properly before the Court, they should remain open. Even if petitioner's single question was important for the uniform operation of the statutory FCA bar, this case is a poor vehicle for the Court to address it.

D. THE DECISION BELOW IS CORRECT

A writ should be denied in this case because the court was correct in its judgment that the statutory bar in §3730(e)(4) is not invoked. That FCA statutory bar is designed to foreclose parasitic *qui tam* actions, when the relator derives knowledge of fraud based upon the public disclosure of allegations in the government's own work-product (or the news media). Moreover, in enacting the bar, Congress created an exception for parasitic actions that are brought by a relator who was an original source of information to the government. On the facts of this case, it is clear that relators' action is not parasitic, and thus the court's decision below was correct.

There is no dispute Dr. Haight predicated allegations of fraud on the fruits of her own investigatory labor. Although she obtained a copy of the NIH grant application through FOIA, no document revealed any investigation or audit of the research project. Not surprising, the grant application did not reveal itself to be full of misrepresentations. Only through Dr. Haight's persistent and thorough investigation was the allegations of fraud uncovered. As the decision below recognized, Congress intended relators to be effective in ferreting out fraud and waste, and it did not want to hamstring relators and keep them from conducting a pre-filing investigation to aid in the recovery of federal funds. Using FOIA as part of the relators' investigation should be encouraged. Had the court held that every FOIA request triggers the bar, would-be relators would be enticed to file actions before completing adequate investigations. No purpose of Congress would be served by such a rule. Indeed, the decision below properly protects the congressional purpose of encouraging the uncovering of fraud while barring only truly parasitic *qui tam* actions.

E. THE COURT SHOULD NOT HOLD THIS CASE UNTIL RESOLUTION OF *ROCKWELL*

Respondents are aware of this Court's grant of certiorari in *Rockwell Intern'l v. United States ex rel. Stone*, Case No. 05-1272, which is currently being briefed on the merits and set for argument in December. However, *Rockwell* does not present any issue which could effect the Ninth Circuit's disposition in *Haight*. *Rockwell* involves (1) application of the statutory bar when the government intervenes, and (2) the definition of "original source." Neither issue is presented on this petition. At this point, the government has not intervened in the case. Moreover, while relator qualifies as an original source, the Ninth Circuit did not need to address that question, and it expressly left it unresolved. App. 10-11.

Although the parties had prepared this case for trial through the close of discovery, it has already been put on hold ever since the district court ruled on the statutory bar. The district court's delayed ruling on the motion issued September 2003. Appellate briefing in the Ninth Circuit began in March 2004. After the matter was fully briefed, hearing in the Ninth Circuit was delayed until September 2005, and the decision was not issued until April 2006. If the Court holds the petition here until after resolution of *Rockwell*, relators would not return to the district court until well into 2007 or even 2008.

Only the fact that both cases involve the statutory prohibition of parasitic *qui tam* actions relates *Haight* to *Rockwell*. No statement of the law on the issues presented in *Rockwell* could have any direct bearing on this case. Moreover, even if the law were to change, the district court will continue to have jurisdiction over the case and will be able to apply any retroactive changes resulting from *Rockwell*. Respondents therefore request that no hold be placed in this case in light of the pendency of the other action.

CONCLUSION

The petition for a writ of certiorari should be denied

Respectfully submitted,

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